

1 TRIAL & TECHNOLOGY LAW GROUP
2 A PROFESSIONAL CORPORATION
3 ROBERT A. SPANNER SBN 60308
3723 HAVEN AVENUE #132
3 MENLO PARK, CA 94025
4 PHONE: (650) 324-2223
FAX: (650) 233-2790
email - ras@techtriallaw.com

5 Attorney for Plaintiffs

6
7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9 **San Francisco Division**

10 HENRY KLYCE and CAROL KLYCE,

CASE NO. 11 CV 02248 WHA

11 PlaintiffS,

12 v.

13 DOES 1-10,

14 Defendants.

15 / **PLAINTIFFS' EX PARTE MOTION
FOR ADMINISTRATIVE RELIEF TO
CONTINUE CASE MANAGEMENT
CONFERENCE, AND MOTION TO
EXTEND DATE FOR SERVICE OF
PROCESS.**

16 Plaintiffs move, pursuant to Civ. L.R. 7-11 and 16-2(d), for 1) continuance of the Case
17 Management Conference, currently scheduled for August 18, 2011 and 2) vacation of the date for
18 filing a Joint Case Management Statement, currently scheduled for August 11, 2011, on the
19 ground that the Doe Defendants have not yet been identified, and therefore no Defendant has
20 been served.

21 **BACKGROUND**

22 Persons unknown have been illegally logging on to the email accounts of Carole and
23 Henry Klyce. These persons, herein denominated as Does 1-10, have denied account access
24 (Complaint, ¶¶7-8), deleted their email (Complaint, ¶9), read their personal email and replied to
25 it, thereby impersonating Carole Klyce (Complaint, ¶10), changed the password security
26 questions so that Carole Klyce was prevented from changing her password and locking these
27 people out of her account (Complaint, ¶11), and so forth. On May 23, 2011 this Court entered
28

1 an Order authorizing Plaintiffs to serve subpoenas on their own Internet Service Providers
 2 ("ISP's") in order to determine the IP addresses of the persons unlawfully accessing and
 3 manipulating their accounts (when a person logs into an account, his or her IP address, a unique
 4 identifier, is captured by the Klyce's ISP).

5 Yahoo!, Carole Klyce's ISP, produced documents pursuant to the subpoena which
 6 disclosed hundreds of unauthorized log-ins, eight principal perpetrators, and three principal
 7 ISP's. Plaintiffs immediately filed, on July 7, 2011, the currently-pending request to this Court
 8 seeking authorization for the issuance of subpoenas to these three ISP's for the identity of the
 9 eight perpetrators [DOC 12]. Since Plaintiffs do not yet know the identity of the Doe
 10 Defendants, they cannot be served; so a Case Management Conference cannot be held.

11 Under L.R.7-11, a party can make a request for administrative relief where a statute or
 12 rule does not govern the situation presented¹. L.R. 16-2(d) provides that a Case Management
 13 Conference can be continued for good cause. That is the case here, where the action is suspended
 14 in limbo until the three aforementioned ISP's can be served with subpoenas and the identities of
 15 the Doe Defendants discovered. Not only will the Case Management Conference have to be
 16 continued, but so will the ADR Compliance date as well.

17 Given the vicissitudes of service of process, including 1) whether the ISP's have accurate
 18 addresses for the persons whose identities are sought; 2) whether those persons (having received
 19 notice from their ISP that someone is seeking their identity) will be attempting to evade service;
 20 and 3) whether the intruders will file motions to quash the subpoenas in order to avoid disclosure
 21 of their identities, a 90-day continuance of the Case Management Conference and related dates is
 22 the bare minimum extension of time the circumstances warrant. There is simply no realistic
 23 prospect whatever of being able to hold a Case Management Conference on the date scheduled;
 24 indeed, by August 18th Plaintiffs will at best be trying to serve Doe Defendants, and at worst will
 25 be contending with motions to quash filed by anonymous Does, which will have to be heard

26
 27 ¹ The Rule requires a declaration. Plaintiffs rely on the declaration of Robert A. Spanner
 28 submitted in support of their motion for authorization of subpoenas to Comcast, Verizon, and
 Time Warner Cable [DOC 13], which explains why no Doe can be identified yet for purpose of
 service.

1 before their identity is revealed, as a matter of procedural due process.

2 For the reasons set forth herein and in Plaintiffs pending motion for the issuance of
3 subpoenas to ISP's Verizon, Comcast, and Time Warner Cable, Plaintiffs urge that the dates
4 currently set for the Case Management Conference, the filing of the Joint Case Management
5 Statement, and the ADR Compliance Date be continued to a date convenient to the Court at least
6 90 days later than the currently scheduled dates.

7 For the selfsame reasons, Plaintiffs also move for an extension of the time in which to
8 serve process. The Complaint in this action was filed on May 10, 2011. F.R.Civ.P.4(m)
9 provides for dismissal if service is not effected within 120 days, but allows the Court to extend
10 the time for service upon a showing of good cause.

11 The procedure set forth in the proposed order authorizing subpoenas to be served on
12 Comcast, Verizon, and Time Warner Cable makes it probable that service will not be effected
13 within 120 days. The proposed order requires these ISP's to withhold production until they have
14 given notice of the subpoenas to the targets of the subpoenas and afforded them the specified
15 time to file a motion to quash. If any motions to quash are filed, it is a virtual certainty that
16 service of process will not be effected within 120 days, because the subpoena procedure and the
17 disposition of noticed motions to quash will consume more than two months, and two months
18 have already passed preparing motions authorizing service of the first round of subpoenas,
19 serving them, negotiating with AOL and Yahoo!, waiting for them to produce, and then awaiting
20 and discussing the expert's analysis of the data. Moreover, even if none of the eight targets of
21 the second round of subpoenas files a motion to quash there is a realistic prospect that service
22 cannot be effected within 120 days, since the subpoenas to Verizon, Comcast, and Time Warner
23 Cable have not yet been served, and one of them might file a motion to quash of its own on
24 behalf of its subscribers; or one of them may simply fail to timely produce responsive documents.

25 For any one of the foregoing reasons, the time to serve process should be extended by 90
26 days, since Plaintiffs have so far been prevented from serving the Doe Defendants "by factors
27 beyond [their] control". *Mateo v. M/S Kiso*, 805 F.Supp. 792, 795 (N.D. Cal. 1992); *Hopscotch
28 Adoptions, Inc. v. Kachadurian*, 2010 U.S. Dist. LEXIS 134271 (E.D. Cal. Dec. 20, 2010).

1 Plaintiffs have been prevented from serving the Doe Defendants because Plaintiffs do not know
2 who they are – but they have been diligently trying to find out.

3 Good cause for an extension of the time within which to serve process is apparent². A
4 ninety-day extension would be appropriate under the circumstances³.

5 **CONCLUSION**

6 Plaintiffs' motion to extend the Case Management and ADR dates should be granted
7 because no Doe Defendant has yet been identified; and Plaintiffs' motion to extend the service
8 date should be granted for the same reason.

9
10 Dated: July 11, 2011

Respectfully submitted,

11 TRIAL & TECHNOLOGY LAW GROUP
12 A Professional Corporation
13 Attorneys for Plaintiffs HENRY KLYCE
14 and CAROLE KLYCE

15 By _____ /s/ Robert A. Spanner
16 Robert A. Spanner

24 _____
25 ² There is nothing in the Federal Rules which prevents the District Court from
proactively extending the time for service of process before the 120-day period has run.

26 _____
27 ³ It is true that there is time to bring this motion to extend the service period as a noticed
28 motion – but it is also true that there is no one to serve notice upon. Moreover, these two
motions are based on the same rationale and the same facts, and it would be a waste of judicial
resources to bring up related motions twice.